CABLE TELEVISION ASSOCIATION OF NY

126 STATE STREET, THIRD FLOOR • ALBANY, NY 12207 • 518/463-6676 • FAX: 518/463-0574

Charles B. Stockdale
Counsel

January 26, 1993

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

Via UPS Next Day Air

Re: MM Docket 92-266 In the Matter of Implemetation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation.

Dear Sirs and Madams:

Enclosed are the original and nine copies of the comments of this Association in response to the Commission's Notice of Proposed Rulemaking (FCC 92-544) in the above-referenced matter.

Very truly yours,

Charles B. Stockdale

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-266
Rate Regulation	)	

COMMENTS OF THE
CABLE TELEVISION ASSOCIATION OF NEW YORK, INC.

Richard F. Alteri
President

Charles B. Stockdale
Counsel

Cable Television Association of
New York, Inc.
126 State Street
Albany, NY 12207
(518) 463-6676

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COMMENTS OF THE
CABLE TELEVISION ASSOCIATION OF NEW YORK, INC.

The Cable Television Association of New York, Inc. ("CTANY"), is a trade association representing 127 cable television systems operating in New York State. Its members provide cable television service to approximately 3.3 million households in New York.

In response to paragraph 76 of the December 24, 1992, Notice of Proposed Rulemaking, FCC 92-544 ("NPRM"), CTANY hereby submits comments regarding implementation of Section 623(b)(5)(C) of the Cable Act -- regulating charges for changes in subscriber selections of services. Cable television operators in New York State have a particular interest in this aspect of the instant rulemaking in light of regulations issued by the New York State Commission on Cable Television ("NYSCCT") that generally prohibit cable operators from imposing a charge for fulfilling a subscriber's request to change to a less expensive level of

service. We hereby urge this Commission to adopt regulations under Section 623(b)(5)(C) both ensuring the right of cable operators to recover their costs incurred in implementing a requested change of service and also making clear that states and localities are preempted from prohibiting or limiting recovery of such costs except to the extent permitted by federal law.

I. THE STATUTE PROVIDES FOR RECOVERY OF ACTUAL COSTS.

The Commission asks, at paragraph 76 of the NPRM, whether cable operators should be permitted, under Section 623(b)(5)(C), to recover costs attributable to implementing a requested change in service or, alternatively, whether they should be limited to recovering only "nominal costs", even where -- as is often the case -- a truck with a technician must be dispatched to physically change the service by installing or removing a trap. Two aspects of Section 623(b)(5)(C) suggest strongly that the regulations to be adopted by the Commission must permit cable operators to recover their actual costs of complying with a subscriber's request for a service change.

First, the statute states simply that the Commission's "standards shall require that charges for changing the service tier selected shall be based on the cost of such change". Nothing in this language suggests that the "cost" which must be recoverable is anything other than the real cost of making the change, whatever the details of calculating that cost may be. Limiting recovery to

"nominal" costs in all cases, therefore, essentially would write the above provision out of the statute.

Second, Section 623(b)(5)(C) provides that the allowable charge "shall not exceed nominal amounts when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method". Thus, Congress specifically addressed the possibility of limiting charges for changing service to "nominal" costs, and it applied this rule only to certain specific situations. This reflects an intention to permit recovery, in all other cases, of more than "nominal" costs.

II. THE COMMISSION SHOULD STATE CLEARLY THAT INCONSISTENT STATE AND LOCAL LAWS ARE PREEMPTED.

In New York State, Section 590.63(f)(3) of NYSCCT's regulations prohibits the imposition of any downgrade charges except in the infrequent case in which the subscriber has initiated or changed his service in the six-month period immediately preceding the date of the downgrade. 1/ We ask the Commission to use this rulemaking to establish clearly that states and localities may not prohibit downgrade charges in this fashion.

1/ Section 590.63(f) provides, in pertinent part, as follows:

> "(f) A cable television company may impose a downgrade charge upon the conditions and in

[footnote continued on next page]

A. The Language of the 1992 Act Demonstrates Congress's Intention to Preempt any General Prohibition against Downgrade Charges.

Section 623(b)(5)(C) requires that the Commission adopt standards basing charges for service changes on cost. A downgrade is a change of service (to a less expensive level of service) and, therefore, downgrade charges are among the charges that, according to statute, must be based on cost.

Section 623(a)(1) provides, in part, that "[n]o Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section ...". Because

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[footnote continued]

> the circumstances as follows:
>
> (1) subscribers have been notified of such charge in writing in at least 10 point type;
>
> (2) the charge does not exceed the cost of the downgrade to the company; [and]
>
> (3) the downgrade is from a level of service which the subscriber has not maintained continuously for six (6) months immediately preceding the date of the downgrade ... ." 9 NYCRR Section 590.63(f).

"Downgrade charge" is defined as "a charge imposed upon a subscriber for implementing a request by the subscriber for a change in service to a less expensive tier than the tier currently subscribed to". 9 NYCRR Section 590.61(h).

Although the language of Section 590.63(f), by its terms, affirmatively authorizes the imposition of downgrade charges, subdivision 590.63(f)(3) effectively prohibits all downgrade charges except where the subscriber has previously changed his service in the last half-year.

Section 623 requires a cost-based regulation of downgrade charges, a state (or local) law that prohibits the imposition of a cost-based downgrade charge exceeds the scope of regulation provided for in that section and, pursuant to Section 623(a)(1), is preempted.

B. State or Local Prohibition of Downgrade Charges Would Frustrate the Commission's Purpose of Reducing Administrative Burdens.

The Commission has indicated in the NPRM a tentative conclusion that a "benchmark" method should be adopted as the primary mode of regulation, of both basic service tier rates (NPRM at paragraph 33) and also rates for "cable programming services" (NPRM at paragraph 92). The reason for favoring a benchmark method of regulating rates for service tiers (both the basic service tier and "cable programming services") is to reduce administrative burdens. NPRM at paragraph 33. See also NPRM at paragraph 30, citing the Commission's statutory responsibility, under Section 623(b)(2)(A), to reduce administrative burdens of rate regulation.

A benchmark method of regulating service tier rates, however, may be largely unworkable in a state that prohibits downgrade charges. Whatever benchmarks are established presumably will be set in accordance with the assumption that, as Section 623 prescribes, downgrade costs will be recovered through downgrade charges rather than through rates for service tiers. If a state is permitted to prohibit charges for downgrades, however, this assumption will not be met, and companies operating in the state

will be forced to recover downgrade costs through their service tier rates. Companies that incur substantial downgrade costs might well be prevented thereby from meeting the pertinent benchmark.

The Commission has suggested that, where benchmarking is an inadequate mode of regulation, the more burdensome method of cost-of-service regulation would be relied upon. See NPRM at paragraph 36. Thus, the consequence of permitting a state to prohibit downgrade charges might well be to impose a cost-based method of regulation on its cable operators and local franchising authorities. Such a result is inconsistent with the Commission's purpose of reducing administrative burdens.

Moreover, if the Commission were to allow the New York prohibition against downgrade charges to stand, it would set the precedent for states and municipalities nationwide to ignore the federal preemption of rate regulation and to declare certain services "free". One could expect soon to see converters, remotes, and perhaps additional outlets made "free". Not only will the goal of unbundling be frustrated, but many more operators will be forced out of benchmark rate regulation and into the cost-based ratemaking that the Commission seeks to avoid.

III. CONCLUSION.

In order to ensure that the legislative intent behind Section 623(b)(5)(C) is appropriately effected, cable operators should be

permitted to recover the actual costs of implementing a requested change in service. CTANY also asks that, to ensure the proper enforcement of Section 623(a)(1) and to protect CTANY's members from the burdens of broad, cost-based regulation of rates, the Commission state clearly in this rulemaking that Section 623 preempts state and local prohibitions against charges for downgrades.

Respectfully submitted,

Cable Television Association of New York, Inc.

Richard F. Alteri
President

By: Charles B. Stockdale
Charles B. Stockdale
Counsel

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Albany, NY 12207
(518)463-6676

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